

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 3 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARCUS SHARIF McNEAL,

Petitioner-Appellant,

v.

JERRY HOWELL, Warden; ATTORNEY
GENERAL FOR THE STATE OF
NEVADA,

Respondents-Appellees.

No. 19-15992

D.C. No. 2:19-cv-00151-RFB-GWF
District of Nevada,
Las Vegas

ORDER

Before: LEAVY, W. FLETCHER and M. SMITH, Circuit Judges.

On January 25, 2019, appellant filed pro se a 28 U.S.C. § 2254 petition in the district court (the “2019 petition”). The district court dismissed the 2019 petition as duplicative of the section 2254 petition he filed in 2016, in D.C. No. 2:16-cv-01618-JAD-GWF (the “2016 petition”), and as an unauthorized second or successive petition. Thereafter, appellant filed a Federal Rule of Civil Procedure 60(b) motion in the district court, which was denied.

The district court erred when it dismissed appellant’s 2019 petition as duplicative and impermissibly second or successive. Because the 2019 petition included a claim that was not raised in the 2016 petition, it should have been treated as a motion to amend the 2016 petition that is still pending before the district court. *See Woods v. Carey*, 525 F.3d 886, 890 (9th Cir. 2008).

For the foregoing reasons, we grant the request for a certificate of appealability, *see* 28 U.S.C. § 2253(c)(3), and summarily vacate the district court's judgment. This case is remanded with instructions for the district court to transfer the 2019 petition to D.C. No. 2:16-cv-01618-JAD-GW, and to docket and consider it as a motion to amend the 2016 petition with the benefit of its original filing date (January 25, 2019). *See Woods*, 525 F.3d at 890. The district court has the discretion to decide whether the motion to amend should be granted. *Id.* We express no opinion as to the merit of that motion or appellant's claims.

VACATED AND REMANDED.